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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

VITALIANO LAZARO,

Defendant and Appellant.

B287585

(Los Angeles County
Super. Ct. No. BA450486)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

Tasha G. Timbadia, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

After a rear-end collision, the driver of a car that caused the accident took cell phones belonging to the other driver and his passenger at gun point. Defendant Vitaliano Lazaro was identified as the robber, and charged with two counts of robbery (Pen. Code, § 211), one count of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)), and one count of unlawful possession of ammunition (Pen. Code, § 30305, subd. (a)(1)). Lazaro's defense at trial was mistaken identity. The jury found defendant guilty on all charges, and further found true the special allegation that defendant had personally used a firearm to commit the offenses (Pen. Code, § 12022.53, subd. (b)). Defendant was sentenced to an aggregate state prison term of 15 years.

On appeal, defendant contends the trial court erred in admitting evidence that he was previously seen driving the same car involved in the collision. Given the defense of mistaken identity, we find no abuse of discretion in the admission of this evidence, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of Trial Evidence

1. *Prosecution evidence*

On the evening of September 21, 2016, S.V. was driving his friend, Juan C. in Juan C's Audi. At a red light, S.V. was hit from behind by a Nissan Altima driven by defendant. Juan C. identified himself as the owner of the Audi. Defendant produced some cash and repeatedly urged Juan C. take it. Juan C. steadfastly refused, saying he would rather call his insurance

company. When Juan C. began to dial a number on his cell phone, defendant pulled out a handgun, aimed it at Juan C. and demanded the phone. Juan C. complied and handed over the phone. Defendant then demanded S.V.'s cell phone. S.V. complied after defendant aimed the gun at S.V.'s chest. After taking the phones, defendant drove away in the Nissan Altima.

The police were notified. Juan C. provided a partial license plate number (7DL867) for the Nissan Altima, and S.V. gave a physical description of the robber. The plate number was potentially matched to a Nissan Altima registered to defendant's father. When Los Angeles Police Detective Steven Razo went to the Lazaro home to find the car, he saw defendant leave the house and drive away in a Nissan Altima bearing the plate number 7DJL867.

The day after the robbery, Juan C. and S.V. separately identified defendant as the robber in a police photographic lineup. The police conducted a search of the Lazaro home, during which defendant's father directed the police to defendant's bedroom. There, inside some dresser drawers, the officers found two semiautomatic handguns and magazines loaded with ammunition.

Los Angeles Police Officer Andrew Garcia testified that he saw defendant driving the same Nissan Altima one year prior to the robbery. Specifically, Officer Garcia testified that on May 31, 2015, he initiated a traffic stop after he saw defendant run a red light while driving a Nissan Altima with plate number 7DJL867.

The parties stipulated that defendant had one prior felony conviction.

2. *Defense evidence*

Defendant did not testify in support of his defense of mistaken identity. Los Angeles Police Officer Tyler Whiteman testified that S.V. had reported a partial license plate number and there was a discrepancy in the police incident report showing the robber's car was a Nissan Maxima and a Nissan Altima.¹

Defendant's brother, Tom Lazaro, testified that defendant lived with his family in the Lazaro home. According to Tom Lazaro, because defendant was an interstate truck driver, he was often away and typically slept in the living room or garage when he was at home. Tom Lazaro claimed ownership of the handguns and ammunition recovered by the officers, and admitted having failed to register the guns.

B. Admissibility of Evidence that Defendant Was Previously Seen Driving the Nissan Altima

Before trial, the prosecutor sought to introduce testimony under Evidence Code² section 1101, subdivision (b) that on two prior occasions, defendant had unlawfully possessed the same type of ammunition found during the search of his bedroom. One of these occasions was Officer Garcia's 2015 traffic stop of defendant, who at the time was driving a Nissan Altima bearing license plate number 7DJL867. Officer Garcia recovered the

¹ On cross-examination, S.V. acknowledged he originally told responding officers that the robber's car was a Nissan Maxima. S.V. testified that he did not know much about cars, and he was told by Juan C. that the robber's car was a Nissan Altima. Juan C. testified on direct examination that the robber's car was either an Altima or a Sentra.

² Statutory references are to the Evidence Code.

ammunition during a search of the car. At a hearing on the motion, the prosecutor argued the two prior incidents were admissible to prove defendant knowingly possessed the ammunition found in his bedroom, and had a common scheme or plan to possess that particular type of ammunition.

The trial court denied the motion, concluding the proffered testimony was inadmissible propensity evidence. However, the court found the evidence that defendant had been stopped in 2015 while driving the same Nissan Altima used a year later in the robberies was probative of defendant's identity and not unduly prejudicial. The court ruled the prosecution "could introduce evidence that there was a traffic stop of some sort and [defendant] was in that vehicle."

Following the trial court's ruling, the following exchange occurred at trial between the prosecutor and Officer Garcia:

"[Prosecutor:] The night that you had your encounter in 2015, with [defendant], how did your encounter with him begin?

"[Officer Garcia:] That evening I was working. I was assigned to Newton gangs. I was working uniformed gangs and we were in the area of 61st and Broadway and we were driving and we conducted a traffic stop on the defendant.

"[Prosecutor:] And what was the first thing that got your— caught your attention that night?

"[Officer Garcia:] The first thing we were driving westbound on 61st street approaching Broadway. We were at a red light, which would have been the northeast corner of 61st and Broadway. There was a liquor store there and there's a clearly marked red zone where the defendant was illegally parked. We

observed the defendant, my partner and I, exited the liquor store, go into the driver's side door of the vehicle and pull away from the right curb.

“[Prosecutor:] When you say ‘the vehicle,’ what type of vehicle was this?

“[Officer Garcia:] It was a blue Nissan.

“[Prosecutor:] And do you remember the model of the car?

“[Officer Garcia:] Yes, sir. It was a Nissan Altima.

“[Prosecutor:] All right. At any point did you document the license plate on that Nissan Altima?

“[Officer Garcia:] Yes, sir.

“[Prosecutor:] And what was the license plate?

“[Officer Garcia:] That would be 7D, as in David, J, as in John, L as in Lincoln, 867.

“[Prosecutor:] Okay, and did you document that in your report?

“[Officer Garcia:] Yes, sir.

“[Prosecutor:] After you—so you observed [defendant] come out of this store and enter the driver's door of the car?

“[Officer Garcia:] That is correct.

“[Prosecutor:] So at that point it appeared to you that he was actually operating the car, correct?

“[Officer Garcia:] Yes.

“[Prosecutor:] Did you conduct a traffic stop on him to actually verify his identity at that point?

“[Officer Garcia:] We did. He pulled away and proceeded to go northbound on Broadway. As he approached 59th, we then observed him run a red light at 59th Place and Broadway and then we conducted a traffic stop for the red-light violation, along with the illegally parked at the red curb at 59th and Broadway.

“Prosecutor:] When you approached the car in order to warn him or cite him for these violations, did you actually verify his identity?

“[Officer Garcia:] Yes, sir. Once we did the traffic stop we ordered the driver, which would be the defendant to my right, out of the vehicle and there was a passenger in the vehicle as well. We ordered them both out of the vehicle and had them stand on the sidewalk.

“[Prosecutor:] Okay. I don’t have any further questions, your Honor.”

DISCUSSION

Defendant contends Officer Garcia’s testimony was inadmissible evidence of prior uncharged offenses within the meaning of section 1101, subdivision (a).³ Defendant further argues that the evidence should have been excluded as more prejudicial than probative pursuant to section 352. The trial court’s evidentiary ruling is reviewed for abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 590.)

³ The parties dispute whether defendant has preserved this issue on appeal. Because defendant is asserting the same evidentiary objection that he raised in the trial court, we conclude he has not forfeited the issue.

A. The Prior Traffic Stop Was Relevant Evidence

Section 1101, subdivision (a) “prohibits admission of evidence of a person’s character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Subdivision (b) of the section provides, however, this rule “does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person’s character or disposition.” (*Ibid.*; see § 1101, subd. (b).) “[E]vidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes[] [citation] . . . only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.’ ” (*People v. Carter* (2005) 36 Cal.4th 1114, 1147; accord, *People v. Edwards* (2013) 57 Cal.4th 658, 711.)

In arguing the trial court abused its discretion by admitting Officer Garcia’s testimony, defendant reasons that evidence of his unlawful parking and running a red light did not share the high degree of similarity with the charged offenses required by the statute to be admissible to prove identity. (See *People v. Leon* (2015) 61 Cal.4th 569, 598 [“[T]he greatest similarity is required to prove identity. When offered on this point, ‘the uncharged misconduct and charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts.’ ”].)

Defendant misapprehends the trial court's ruling, and the reasoning supporting it. As the People point out, Officer Garcia's testimony was not admitted as prior uncharged crimes evidence. While the prosecution initially moved to introduce defendant's earlier incidents of ammunition possession under section 1101, subdivision (b), the trial court denied the People's motion and excluded the evidence. The court then made a separate ruling that a portion of Officer Garcia's testimony—that defendant was seen driving a Nissan Altima bearing license plate number 7DJL867—was relevant as circumstantial evidence of defendant's identity as the robber. Accordingly, the issue is one of relevance and not prior uncharged crimes.

Only relevant evidence is admissible. (§ 350.) Relevant evidence is evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (§ 210.) “‘While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. [Citation.] Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury.’” (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) Material facts include identity, intent or motive. (*People v. Bivert* (2011) 52 Cal.4th 96, 116–117.) “The trial court has considerable discretion in determining the relevance of evidence.” (*People v. Williams* (2008) 43 Cal.4th 584, 633–634.)

Here, the identity of the robber was contested. S.V. gave inconsistent testimony on the model of the robber's car, Juan C. recorded a partial license plate number of the car, and the car

was registered to defendant's father. On the other hand, Juan C. identified the robber's car as a Nissan Altima, the Nissan Altima registered to defendant's father had a license plate number that matched the plate number Juan C. recorded plus the missing letter, and Detective Razo saw defendant driving the Nissan Altima shortly after the robberies.

In light of this contested evidentiary record, evidence that Officer Garcia saw defendant driving the same Nissan Altima before the robberies was probative of defendant's identity as the robber. The trial court therefore did not abuse its discretion in admitting evidence tending to show defendant drove the Nissan Altima involved in the robbery.

B. The Evidence Was Not Unduly Prejudicial

Nor was the evidence unduly prejudicial such that it should have been excluded pursuant to section 352. Defendant argues that Officer Garcia's disclosure that he was working a specialized gang unit detail on the night of the traffic stop was inflammatory. Defendant also argues that by giving reasons for the traffic stop, the officer caused the jury to prejudge defendant as a non-law-abiding citizen.

We disagree. The officer introduced his testimony by identifying himself, his assignment and the reason he was in the area. There was no suggestion in his ensuing testimony, or any other evidence, that defendant was a gang member or suspected of engaging in any gang-related activities. Further, defendant's parking and driving infractions explained the reason he drew the officer's attention and was ultimately stopped. In this context, such ordinary infractions were not unduly prejudicial.

Finally, we reject defendant's claim that the challenged evidence was cumulative and therefore unduly prejudicial. Here, the evidence was inconsistent as to defendant's identity as the robber. Although S.V. identified defendant in a photographic lineup and at trial, he acknowledged on cross-examination that he did not remember defendant at the preliminary hearing and had asked to see the photographic lineup before identifying him in that proceeding. Juan C. identified defendant in a photographic lineup, but he did not identify defendant at trial. Juan C. also acknowledged on cross-examination that he was unable to identify defendant as the robber at the preliminary hearing. Because such evidence was susceptible to conflicting inferences as to defendant's identity as the robber, we cannot say Officer Garcia's testimony was cumulative of other evidence of identity. The trial court was well within its discretion in admitting the evidence.

DISPOSITION

The judgment is affirmed.

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WEINGART, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.